State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
DENYING EMERGENT RELIEF
OAL DKT. NO. EDS 03393-19
AGENCY REF. NO. 2019 29499

L.G. AND M.R. ON BEHALF OF M.C.,
Petitioners,
v.
GLOUCESTER CITY BOARD OF EDUCATION,
Respondent.

L.G. and M.R. on behalf of M.C., petitioners, pro se

Victoria Beck, Esq., for respondent, Gloucester City Board of Education (Parker McCay, attorneys)

Record Closed: March 15, 2019 Decided: March 15, 2019

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by petitioners on behalf of their son, M.C. ("petitioners"), through a motion for emergent relief filed on March 11, 2019, with the New Jersey

Department of Education ("DOE"), Office of Special Education Programs ("OSEP").[1] Respondent, the Gloucester City Board of Education ("Board"), had agreed to petitioners' request that M.C. receive appropriate out-of-district placement, and called for M.C. to receive home instruction until the out-of-district placement was finalized, due to M.C.'s behavioral and disciplinary issues at Gloucester City Middle School ("GCMS"). In response, petitioners sought "stay-put" relief from the Board in the form of an order to compel the Board to continue M.C. in his present program at GCMS, pending the out-of-district placement being finalized or the outcome of a due process hearing.

The motion for emergent relief was transmitted to the Office of Administrative Law ("OAL") on March 11, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Oral argument was heard on March 15, 2019, and the record closed on that date. A Final Decision was issued at the hearing denying petitioners' motion for emergent relief.

FINDINGS OF FACT

Based on petitioners' application for emergent relief and accompanying documentation, respondent's brief dated March 14, 2019, and testimony at the Hearing, I **FIND** the following to be the undisputed facts:

1. Petitioners L.G. and M.R. are the parents of minor student, M.C., an eleven-year-old currently eligible for special education under the classification of autism. M.C. was enrolled at GCMS.

2. On several occasions, M.C. had engaged in behaviors that were physically threatening to other students and staff, as well as towards himself, such as threatening physical and/or gun- and knife-related violence, and suicide. M.C. physically attacked other students in his classes. M.C. violently assaulted staff members, resulting in one staff member having to seek medical care.

[1] Petitioners have also filed for a due process hearing seeking an appropriate educational program and out-of-district placement for student M.C., which had not yet been transmitted to OAL.

3. On January 30, 2019, M.C. was removed from his special education classroom and placed in a classroom with two teachers' aides and no other students. He was given worksheets assignments, but received no occupational or speech therapy, or any other service called for in his Individualized Education Program ("IEP") dated January 29, 2019. When L.G. and M.R. became aware of this change in classroom, they filed a complaint with the DOE, resulting in M.C. being returned to his normal class. But M.C.'s threatening behavior continued.

4. On February 26, 2019, and March 4, 2019, M.C. made gun-shooting gestures while at GCMS and shouted that he was going to bring a gun to school, resulting in the police being dispatched to petitioners' home to check for loaded weapons. None were found.

5. M.C. had been sent home from school several times in 2019 due to his behavior. L.G. and M.R. had subsequently made several requests to respondent for M.C. to receive out-of-district placement, claiming that GCMS was not equipped to deal with M.C.'s behavioral issues.

6. On March 6, 2019, respondent sent an email to petitioners agreeing to provide M.C. with out-of-district placement, and that M.C. would receive home instruction until the out-of-district placement and new educational plan had been finalized. Petitioners did not consent to home instruction due to their work schedules. On March 8, 2019, petitioners brought M.C. to GCMS but he was denied admission. The Board made several unsuccessful attempts to make arrangements with L.G. and M.R. for home instruction to begin.

7. M.C.'s last day receiving educational services was March 7, 2019.

LEGAL ANALYSIS

The issue is whether petitioners are entitled to emergent relief so that their minor child, M.C., may return to the school called for in his current IEP until his new out-of-district educational placement is finalized.

N.J.A.C. 6A:14-2.7(r) allows either party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request shall be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, (iii) placement pending the outcome of due process proceedings, and (iv.) issues involving graduation or participation in graduation ceremonies.

Petitioners specifically pleaded in their application for emergent relief that N.J.A.C. 6A:14-2.7(r)(1) (i.) through (iii.) apply to M.C.

Subsection (i.) would require a break in the educational services provided to student M.C. On March 6, 2019, respondent submitted a plan to petitioners that would provide home instruction to M.C. until a new, out-of-district placement was finalized, which would have prevented any break in services. Additionally, an IEP meeting was scheduled for March 15, 2019, to discuss the transition to a new school as well as home instruction during the interim period. Petitioners, however, did not consent to home instruction because of their work schedules.

Respondent correctly asserted that the break in services was “self-created” by petitioners. The interim period between GCMS and the new out-of-district placement was anticipated to last only two to three weeks, and respondent submitted a plan for ensuring that services continued during that period. It was petitioners who refused to consent to the home instruction. The Board made efforts to preclude any break in services by having GCMS staff continue contacting petitioners to finalize arrangements for the home

instruction, and by scheduling a meeting for March 15, 2019, to finalize the arrangements. The Board was therefore ready, willing and able to provide M.C. with home instruction during this interim period.

Accordingly, I **FIND** that petitioners failed to establish that there had been a break in services such as to meet the statutory prerequisites for emergent relief.

Regarding (iii.), the underlying due process proceedings were meant to determine whether M.C. was entitled to out-of-district placement. The respondent Board, however, had already agreed in writing to place M.C. in a new out-of-district educational setting. Accordingly, I **FIND** that this issue is moot and does not create grounds for emergent relief.

Respondent sought to dispose of issues related to subsection (ii.), because there was no official disciplinary action at issue. However, (ii.) states, "Issues involving disciplinary action, including manifestation determinations and *determinations of interim alternate educational settings*." (emphasis added.) Accordingly, although this case does not revolve around the appeal of formal disciplinary findings, the Board took disciplinary measures to isolate M.C. from other students by moving him into a solitary room with only staff and no other students, and by no longer allowing M.C. to attend GCMS. With both parties in agreement that GCMS no longer served M.C.'s behavioral needs and that out-of-district placement was required, the only remaining issue in this petition for emergent relief would be the interim alternate educational settings required for M.C. until he is enrolled at a new school.

Accordingly, I **FIND** that petitioners have met condition (ii.), and therefore have met the prerequisites making them eligible to apply for emergent relief.

Pursuant to N.J.A.C. 1:6A-12.1(e) and N.J.A.C. 6A:14-2.7(s)(1), emergency relief may be granted if the judge determines from the proofs that:

> i. The petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal right underlying the petitioner's claim is settled;

iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

However, when the emergent-relief request effectively seeks a "stay-put" preventing the school district from making a change in placement from an agreed-upon IEP, the proper standard for relief is the "stay-put" provision under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)) (stay put "functions, in essence, as an automatic preliminary injunction"). The stay-put provision provides in relevant part that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

The relevant IDEA regulation and its counterpart in the New Jersey Administrative Code reinforce that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a) (2016); N.J.A.C. 6A:14-2.7(u). The stay-put provision functions as an automatic preliminary injunction which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be ordered. Drinker, 78 F.3d 859. Its purpose is to maintain the status quo for the child while the dispute over the IEP remains unresolved. Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

As the term "current educational placement" is not defined within the IDEA, the Third Circuit standard is that "the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is

invoked." Drinker, 78 F.3d at 867 (citing the unpublished Woods ex rel. T.W. v. N.J. Dep't of Educ., No. 93-5123, 20 IDELR 439, 440 (3d Cir. Sept. 17, 1993)); see also Susquenita Sch. Dist. v. Raelee S. by Heidi S. & Byron S., 96 F.3d 78, 83 (3d Cir. 1996) (restating the standard that the terms of the IEP are dispositive of the student's "current educational placement"). The Third Circuit stressed that the stay-put provision of the IDEA assured stability and consistency in the student's education by preserving the status quo of the student's current educational placement until the proceedings under the IDEA are finalized. Drinker, 78 F.3d 859.

Furthermore, the Third Circuit explained that the stay-put provision reflected Congress's clear intention to "strip schools of the unilateral authority that they had traditionally employed to exclude [classified] students, particularly emotionally disturbed students, from school." Id. at 864 (citing Honig v. Doe, 484 U.S. 305, 323, 108 S. Ct. 592, 604, 98 L. Ed. 2d 686, 707 (1988)); School Comm. v. Dep't of Educ., 471 U.S. 359, 373, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 397 (1985). Therefore, once a court determined the current educational placement, the petitioner was entitled to a stay-put order without having to satisfy the four prongs for emergent relief. Drinker, 78 F.3d at 864 ("Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief").

The IDEA stay-put law and regulations set out two exceptions where it is the Board, rather than the parents, seeking to change the operative placement during the litigation. The first is where the parents agree with the change of placement. 20 U.S.C. § 1415(j). The second exception arises under the disciplinary provisions of IDEA, 20 U.S.C. § 1415(k).

In the within matter, the Board is seeking to provide home instruction rather than have M.C. continue attending GCMS. The first exception does not apply, because L.G. and M.C. have not agreed to the home instruction. The second exception to the stay-put statute does apply, because respondent Board has raised disciplinary issues with regard to M.C.'s attendance at GCMS.

20 U.S.C. § 1415(k)(1)(a) states that school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. Within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parents and relevant members of the IEP team are to review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability (the "manifestation determination"), or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

IDEA addresses special circumstances where a manifestation determination is not the final dictate. Under 20 U.S.C. § 1415(g), school personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child carries or possesses a weapon to or at school, on school premises or to or at a school function.

No evidence had been proffered showing that M.C. carried any weapons onto school grounds. But M.C. did threaten both gun and knife violence, and perpetrated actual physical violence against fellow students and school staff; a determined assailant, regardless of age, could certainly use other objects in a classroom, such as scissors or pens, to stab a fellow student or teacher. But rather than relying on 20 U.S.C. § 1415(g), respondent cited to New Jersey regulations, which provide broader language as to a school's responsibilities. N.J.A.C. 6A:14-2.8(b) allows school districts to make decisions on a case-by-case basis, considering unique circumstances when determining whether to impose a disciplinary sanction or change placement for a student with a disability who violates a school code of conduct.

Student M.C. made several serious and dangerous threats to himself, other students, and teachers and staff. He injured others on school grounds. Considering today's climate of violence on school properties, a school had a greater responsibility to

take threats seriously. Looking at Federal and State law together, I **FIND** that the respondent Board had the discretion to take necessary steps to address the violent actions and threats by a student, and I **CONCLUDE** that the situation of a student threatening physical violence and the possible use of weapons fit within an exception to stay-put statutes. Further, I **CONCLUDE** that the Board had taken appropriate steps to ensure that there would be no break in educational services when it made home instruction available to M.C. until his new out-of-district placement was finalized.

ORDER

The petitioner's motion for stay-put emergent relief is **DENIED**. It is **ORDERED** that an IEP meeting take place on March 15, 2019, to finalize arrangements for home instruction to take place in petitioners' home for the interim period preceding M.C.'s new out-of-district placement, which must include speech therapy and occupational therapy in addition to instructional time, and that educational services missed between March 7 and March 15, 2019, be made up through home instruction. Any other requested relief is hereby **DENIED**.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

March 15, 2019
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency

Date Mailed to Parties:

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APPENDIX

WITNESSES:

For petitioners:

L.G.

M.R.

For respondent:

Amy Francis, Supervisor of Special Services, Gloucester City Public Schools

EXHIBITS:

For petitioners:

Collection of documents, submitted March 14, 2019

For respondent*:*

Brief, dated March 14, 2019, with accompanying Certification of Amy Francis, Supervisor of Special Services, Gloucester City Public Schools